

Statement for the Record

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Introduction

Mr. Chairman, Mr. Waxman, Committee Members, I am pleased to appear before you today to discuss the Department of Homeland Security's implementation of the Support Anti-terrorism by Fostering Effective Technologies Act of 2002 ("the SAFETY Act"). As you may know, the SAFETY Act provides incentives for the development and deployment of qualified anti-terrorism technologies (ATTs) by creating a system of "risk management" and a system of "litigation management." , The SAFETY Act is part of the Homeland Security Act of 2002, which is the organic legislation of the Department of Homeland Security.

With the creation of the Department of Homeland Security, President Bush envisioned an organization that would engage entrepreneurs and tap America's inventive spirit in the war on terrorism. The Science and Technology (S&T) Division of the Department is specifically tasked with marshalling the intellectual capital of the engineering and scientific communities to develop fresh and effective approaches to safeguard the American public from terrorist attacks. The SAFETY Act is an important vehicle for removing obstacles for the deployment of these capabilities to the field.

Implementation of the SAFETY Act

The purpose of the SAFETY Act is to ensure that the threat of liability does not deter potential manufacturers of qualified ATTs from developing and commercializing technologies that could significantly reduce the risks or mitigate the effects of large-scale terrorist events. The Act thus creates certain liability limitations for "claims arising out of, relating to, or resulting from an act of terrorism" where qualified ATTs have been deployed. The Act does not limit liability for harms caused by ATTs when no act of terrorism has occurred. Clearly, the issue Congress is addressing concerns the uncertain risk environment born out of the threat of terrorism. The potential risks and liabilities that stem from the technologies deployed in our war against terrorism are very difficult to quantify. As a result, in many cases insurance has become largely unobtainable or so costly as to leave the technologies in question without a market. It is hardly surprising that companies are unwilling to bet their existence by developing and deploying

services and products in this uncertain climate. This means that key capabilities needed to secure the homeland may not be available for deployment. The SAFETY Act thus serves to encourage the development and deployment of ATTs that will significantly enhance the protection of the nation by providing certain liability protections to allow the vast resources of the national research and development enterprise to be engaged for securing the homeland.

Given the significance and complexity of this groundbreaking statute, the Department of Homeland Security decided to develop and publish a regulation setting forth the Department's policies and procedures for its implementation. The Department solicited comments on the proposed SAFETY Act regulation this summer and published an interim final rule that was signed by Secretary Ridge on October 10th, incorporating suggestions from many of the thoughtful comments provided by almost 45 organizations and individuals during the first public comment period. Under the interim rule, we will continue to accept and entertain comments as we begin the process of executing the Act.

The Department is, under the Rule, implementing the SAFETY Act within the Science & Technology Directorate and I, as Assistant Secretary, am responsible for evaluating applications and recommending to the Under Secretary for Science and Technology whether ATTs should be approved or rejected for a designation/certification, under the authority delegated to him by the Secretary under the SAFETY Act.

Users of a technology designated as a qualified anti-terrorism technology under the SAFETY Act enjoy significant liability protection. Specifically, liability is limited in scope to only the seller of the technology, and is limited to an amount where the requisite insurance coverage does not unreasonably distort the price of the technology. The statute provides for a very broad definition of "technology," including tangible products, software and services (including support services).

The seven criteria specified in the statute for designation of a technology seek, in essence, three kinds of information:

- Technical –Does the technology work? Does it provide useful levels of performance in scenarios of interest? Is it mature enough for near-term deployment?
- Threats addressed — What specific threats does the technology address? What is the level of risk exposure to the public if the technology is not deployed?
- Economic and actuarial — How does the risk of liability affect demand for the product or its deployability? What are the liability risks?

Additional criteria are associated with Certification. In particular, detailed safety and hazard data are required in the statute in order for a technology to qualify for the government contractor defense presumption.

This suite of criteria presents a very complex and unusual analysis challenge. We are striving for development of a consistent and equitable methodology that implements the intent of Congress, while retaining flexibility to assess a vast array of potential technologies within a constantly changing threat environment.

I will now describe the infrastructure that has been created to fulfill our responsibilities to implement the SAFETY Act effectively.

We have created a SAFETY Act Office to house permanent federal staff to oversee this effort. The technical experts in my office — supported by over 100 government scientists and engineers in the Science and Technology Directorate along with the vast resources at our national labs— will be responsible for evaluating the required data and analyses. These highly skilled professionals work with me to provide the basis for my recommendation to the Under Secretary regarding the granting of Designations and Certifications.


To assist us in these efforts, I am fortunate to have the full support of Mr. Joe Whitley, the DHS General Counsel. He and his staff have played a pivotal role during the rulemaking process and are available to address legal policy issues as they arise.

We are contracting with the Institute for Defense Analyses (IDA), a Federally-funded Research and Development Center (FFRDC), to provide analytic support. IDA has long provided similar support to the Department of Defense (DOD), including DoD's Operational Test & Evaluation Office. IDA understands how to evaluate test data when applied to a variety of threat scenarios, how to perform experimental design and have experience with a wide range of national security technologies. As an FFRDC, they provide proven objectivity and ability to access both classified and proprietary data. They also provide a broad and deep capacity for performing the requisite economic analyses and have supplemented their expertise with specialists from Yale, Cornell, the University of Michigan, the University of California – Davis, and Syracuse. They are also working closely with academia, including Georgia State University, the University of Georgia, Carnegie-Mellon, and the University of Wisconsin, to assist us in establishing a process to evaluate actuarial data.

We have also entered into a contract with Integrated Data Systems (IDS) to develop and implement a Web-based application and evaluation tracking process. IDS has created similar systems for DoD's Technical Support Working Group in their web-based proposal system, and we are using their secure and user-friendly approach as a springboard. In addition to providing a process to file an application, IDS also provides an on-line tracking capability so that businesses can check the status of their applications, and for the Government to efficiently evaluate, monitor, and archive application information.

We are implementing a "Pre-Application process" to assist businesses—particularly small businesses—in this process. This voluntary pre-application process allows businesses to get an "initial read" on the likelihood that their technology will meet the criteria for designation before going through the expense of preparing a full application. It also allows businesses of all types to get a similar advisory opinion early in the development process.

Recently, I and my SAFETY Act team went on the road, holding seminars and fielding questions in Dallas, Los Angeles, Atlanta, Chicago and, just this past Tuesday, in Washington, DC, to inform American business people about the Act and its implementation.

The interim rule is in place, the application kit is available, and the ormation seminars are complete. We are now initiating the implementation of the Act. We expect that as we move

forward we will learn more efficient and effective ways to facilitate the deployment of technologies important to securing the homeland.

Thank you for this opportunity to address this important issue with you today. I look forward to your questions.